

#Em-560

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Pre-Print RECOMMENDATION

Eminent Domain: Pre-Condemnation Activities

Note: This is a pre-print report. The Law Revision Commission has approved the substance of this report, but minor editorial changes may be made prior to final publication.

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SUMMARY OF RECOMMENDATION

California's statutory Eminent Domain Law includes comprehensive procedures relating to the taking of private property for public use. One part of that law governs a potential condemnor's entry and activity on private property for the purpose of evaluating its suitability for public use. That kind of pre-condemnation activity can itself constitute a taking, entitling the property owner to compensation.

California case law has established that a property owner may also be entitled to compensation for losses caused by a condemnor's unreasonable actions before an eminent domain proceeding has commenced. That kind of loss is known colloquially as "Klopping damages."

The Law Revision Commission recommends that the Eminent Domain Law be revised to make the following improvements related to compensation for pre-condemnation losses:

- Codify the holding of *Property Reserve Inc. v. Superior Court*,¹ to make clear that a property owner has a waivable right to a jury trial determination of the amount of compensation owed for losses caused by pre-condemnation activity.
- Provide that a property owner who is entitled to compensation under Code of Civil Procedure Section 1245.060 for losses due to pre-condemnation activity has the option of instead seeking that compensation as a defendant in an eminent domain action related to that property.
- Codify California case law providing that a property owner may seek compensation for Klopping damages as a defendant in an eminent domain action.
- Make clear that a property owner who seeks compensation for either kind of pre-condemnation loss as a defendant in an eminent domain action must plead the claim for that compensation in the owner's answer.

Other technical or conforming revisions are also proposed.

This recommendation was prepared pursuant to Resolution Chapter 158 of the Statutes of 2018.

1. *Property Reserve Inc. v. Superior Court*, 1 Cal. 5th 151 (2016).

EMINENT DOMAIN: PRE-CONDEMNATION ACTIVITIES

1 INTRODUCTION

2 The “takings clause” of the California Constitution provides that private property
3 shall not be taken for a public purpose without just compensation.²

4 California’s statutory Eminent Domain Law³ establishes a procedure that can be
5 used to take private property for public use.⁴ Consistent with the takings clause, that
6 law requires that the property owner receive just compensation for the property
7 taken.⁵

8 A property owner may also be entitled to compensation for losses suffered as a
9 result of a condemnor’s actions prior to commencing an eminent domain action.
10 This recommendation considers two ways in which that may arise:

- 11 (1) *Pre-condemnation activity*. Under existing statutory law, a condemnor who is
12 considering taking private property for a public use may petition the court for
13 permission to enter the property and conduct testing to evaluate its suitability.⁶
14 As a condition of such entry, the condemnor must deposit with the court an
15 amount determined sufficient by the court to compensate the property owner
16 for losses caused by the pre-condemnation activity.⁷ If such losses do occur,
17 the property owner may seek compensation by pursuing a civil action, or by
18 applying to the court for an award from the amount deposited by the
19 condemnor.⁸
- 20 (2) *“Klopping” damages*. In *Klopping v. City of Whittier*,⁹ the California
21 Supreme Court held that a property owner was entitled to seek compensation
22 for loss caused by a condemnor’s unreasonable delay following an
23 announcement of intent to commence an eminent domain action, or by other
24 unreasonable conduct by the condemnor, prior to commencing the eminent
25 domain action.¹⁰

2. Cal. Const. art. I, § 19(a) (“Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.”).

3. Title 7 (commencing with Section 1230.010) of Part 3 of the Code of Civil Procedure.

4. See Chapter 3 (commencing with Section 1240.010) of Title 7 of Part 3 of the Code of Civil Procedure.

5. See Chapter 9 (commencing with Section 1263.010) of Title 7 of Part 3 of the Code of Civil Procedure.

6. Code Civ. Proc. §§ 1245.010-1245.030.

7. Code Civ. Proc. § 1245.030(c).

8. Code Civ. Proc. § 1245.060(a), (c).

9. *Klopping v. City of Whittier*, 8 Cal.3d 39 (1972).

10. *Id.* at 52.

1 The Law Revision Commission recommends that the Eminent Domain Law be
2 revised to make the following improvements related to compensation for pre-
3 condemnation losses:

- 4 • Codify the holding of *Property Reserve Inc. v. Superior Court*,¹¹ to make clear
5 that a property owner has a waivable right to a jury trial determination of the
6 amount of compensation owed for losses caused by pre-condemnation
7 activity.
- 8 • Provide that a property owner who is entitled to compensation under Code of
9 Civil Procedure Section 1245.060 for losses due to pre-condemnation activity
10 has the option of instead seeking that compensation as a defendant in an
11 eminent domain action related to that property.
- 12 • Codify California case law providing that a property owner may seek
13 compensation for Klooping damages as a defendant in an eminent domain
14 action.
- 15 • Make clear that a property owner who seeks compensation for either kind of
16 pre-condemnation loss as a defendant in an eminent domain action must plead
17 the claim for that compensation in the owner’s answer.

18 RIGHT TO JURY TRIAL

19 In *Property Reserve*,¹² the California Supreme Court considered whether activity
20 authorized by California’s statutory pre-condemnation procedure can constitute a
21 “taking” of an owner’s property for purposes of the “takings clause” of the
22 California Constitution, and if so, whether the procedure is compatible with
23 constitutional requirements.

24 The court first held that pre-condemnation activity authorized by the statute can
25 result in a taking under the California takings clause:

26 [S]ome pre-condemnation entry and testing activities — when they involve
27 operations that will result in actual injury to, or substantial interference with the
28 possession and use of, the entered property — have been viewed as triggering the
29 protections of the California takings clause.¹³

30 The court then considered whether the pre-condemnation activity statute satisfied
31 the requirements of the California takings clause. The court held that it did, with one
32 exception. Specifically, the statute violates the California takings clause because it
33 does not provide for a jury determination, unless waived, of the amount of
34 compensation due the property owner for a pre-condemnation “taking.”¹⁴

35 Rather than invalidate the statute based on that infirmity, the court reformed it:

11. *Property Reserve Inc. v. Superior Court*, 1 Cal. 5th 151 (2016).

12. *Id.*

13. *Id.* at 192.

14. *Id.* at 208.

1 The Commission sees no policy reason to preclude the recovery of compensation
2 for losses caused by pre-condemnation activity in the subsequent eminent domain
3 proceeding. Nor does the Commission see any practical problem that would result
4 from that approach.

5 For the reasons discussed above, the Commission recommends that the law be
6 revised to expressly allow a property owner to seek compensation for losses caused
7 by pre-condemnation activity in an eminent domain action commenced by the
8 condemnor.¹⁸ This would be an optional alternative to seeking compensation either
9 in a civil action against the condemnor, or from the amount deposited with the court
10 by the condemnor prior to engaging in the pre-condemnation activity.

11 **Klopping Damages**

12 Courts have consistently held that Klopping damages may be recovered in an
13 eminent domain action.¹⁹

14 The Commission recommends that the Eminent Domain Law be revised to codify
15 that rule.

16 FORM OF PLEADING

17 If an owner is authorized to seek compensation for pre-condemnation loss in an
18 eminent domain action, it would be helpful to specify the form of pleading the owner
19 must use to assert that claim. As discussed below, there is likely to be some
20 confusion on this point.

21 In the Comment to Code of Civil Procedure Section 1245.060, the Commission
22 states that compensation for losses caused by pre-condemnation activity may only
23 be sought in a subsequent eminent domain proceeding by means of a cross-
24 complaint.²⁰ As authority for that position, the Commission cites Code of Civil
25 Procedure Section 426.70 and the Comment to that section.

26 Section 426.70 was added on the Commission's recommendation, to make the
27 law on compulsory cross-complaints applicable to eminent domain proceedings.²¹
28 The Comment to Section 426.70 explains the purpose of the addition:

29 Subdivision (a) of Section 426.70 — by making this article applicable to eminent
30 domain proceedings — codifies the principle that a related cause of action must be
31 asserted against the plaintiff in an eminent domain action or it is barred. *Klopping*
32 v. *City of Whittier*, 8 Cal.3d 39, 58, 500 P.2d 1345, 1360, 104 Cal. Rptr. 1, 16

18. See proposed Code Civ. Proc. § 1245.060(a) *infra*.

19. See *Redevelopment Agency v. Contra Costa Theatre, Inc.*, 135 Cal. App. 3d 73 (1982); *People ex rel. Dept. Pub. Wks. v. Peninsula Enterprises, Inc.*, 91 Cal. App.3d 332 (1979); *Richmond Redevelopment Agency v. Western Title Guaranty Co.*, 48 Cal. App. 3d 343 (1975).

20. *The Eminent Domain Law*, 12 Cal. L. Revision Comm'n Reports 1601, 1742 (1974).

21. *Id.* at 1889.

1 (1972) (damages caused by pre-condemnation announcements). The related cause
2 must be asserted as a cross-complaint. See Section 426.30.²²

3 Despite that guidance, courts have subsequently held that Klopping damages
4 should be pled as part of the property owner’s answer in an eminent domain action.²³
5 Pleading Klopping damages in a cross-complaint has been specifically considered
6 and rejected.²⁴

7 The Commission sees merit in providing that claims related to pre-condemnation
8 activity be pled in the defendant’s answer. This would minimize the number of
9 pleadings required (by avoiding the need for a cross-complaint and an answer to
10 that cross-complaint).

11 Moreover, it would make sense for the procedure that is used to claim
12 compensation for pre-condemnation activity losses to parallel the existing practice
13 that governs Klopping damages. Both types of claims involve a loss suffered as a
14 result of the condemnor’s actions before commencing an eminent domain action.

15 The Commission recommends that Code of Civil Procedure Section 1250.320 be
16 revised to require that a claim by a property owner in an eminent domain action for
17 losses caused by pre-condemnation activity be included in the owner’s answer.
18 Further, to avoid any confusion on the point, the Commission recommends that
19 Section 1250.320 codify existing case law and require Klopping damages to also be
20 pled in the owner’s answer.

21 TECHNICAL AND MINOR SUBSTANTIVE REVISIONS

22 The Commission also recommends a small number of technical and minor
23 substantive amendments, to follow standard drafting practices and conform to the
24 reforms discussed above.²⁵

25 The most significant conforming revision is to Code of Civil Procedure Section
26 1260.230, a provision that requires the trier of fact in an eminent domain action to
27 separately assess distinct types of compensation that are claimed by the property
28 owner. Because the Commission’s recommendation would add two new types of
29 compensation that could be claimed by the property owner, the recommendation
30 proposes to revise Section 1260.230 to require separate assessment of each of those
31 types of compensation. That would extend the existing policy of requiring separate
32 assessment by the trier of fact, so that it would apply to the new types of
33 compensation that could be claimed in an eminent domain action.

22. *Id.*

23. See *Redevelopment Agency*, 135 Cal. App. 3d at 79, n.2; *People ex rel. Dept. Pub. Wks.*, 91 Cal. App.3d at 352-53; *Richmond Redevelopment Agency*, 48 Cal. App. 3d at 350.

24. See *Redevelopment Agency*, 135 Cal. App. 3d at 79, n.2; *People ex rel. Dept. Pub. Wks.*, 91 Cal. App.3d at 352-53; *Richmond Redevelopment Agency*, 48 Cal. App. 3d at 350.

25. See proposed Code Civ. Proc. §§ 1245.020, 1245.060(a), 1245.060(d), 1250.320(b), 1260.230(d) and (e) *infra*.

PROPOSED LEGISLATION

1 **Code Civ. Proc. § 1245.020 (amended). Entry**

2 SECTION 1. Section 1245.020 of the Code of Civil Procedure is amended to read:

3 1245.020. In any case in which the entry and activities mentioned in Section
4 1245.010 will subject the person having the power of eminent domain to liability
5 under Section 1245.060, before making ~~such~~ entry and undertaking ~~such~~ those
6 activities, the person shall secure at least one of the following:

7 (a) The written consent of the owner to enter upon ~~his~~ the owner's property and
8 to undertake ~~such activities~~; or those activities.

9 (b) An order for entry from the superior court in accordance with Section
10 1245.030.

11 **Comment.** Section 1245.020 is amended to make technical corrections.

12 **Code Civ. Proc. § 1245.060 (amended). Compensation**

13 SEC. _____. Section 1245.060 of the Code of Civil Procedure is amended to read:

14 1245.060. (a) If the entry and activities upon property cause actual damage to or
15 substantial interference with the possession or use of the property, whether or not a
16 claim has been presented in compliance with Part 3 (commencing with Section 900)
17 of ~~Divison~~ Division 3.6 of Title 1 of the Government Code, the owner may recover
18 for ~~such that~~ that damage or interference in a civil action, as a defendant in an eminent
19 domain action affecting the property, or by application to the court under
20 subdivision (c).

21 (b) The prevailing claimant in an action or proceeding under this section shall be
22 awarded ~~his~~ the claimant's costs and, if the court finds that any of the following
23 occurred, ~~his~~ the claimant's litigation expenses incurred in proceedings under this
24 article:

25 (1) The entry was unlawful.

26 (2) The entry was lawful but the activities upon the property were abusive or
27 lacking in due regard for the interests of the owner.

28 (3) There was a failure substantially to comply with the terms of an order made
29 under Section 1245.030 or 1245.040.

30 (c) If funds are on deposit under this article, upon application of the owner, the
31 court shall determine and award the amount the owner is entitled to recover under
32 this section and shall order ~~such that~~ that amount paid out of the funds on deposit. If the
33 funds on deposit are insufficient to pay the full amount of the award, the court shall
34 enter judgment for the unpaid portion. In a proceeding under this subdivision, the
35 owner has a right to a jury trial, unless waived, on the amount of compensation for
36 actual damage to or substantial interference with the possession or use of the
37 property.

38 (d) Nothing in this section affects the availability of any other remedy the owner
39 may have for the damaging of ~~his~~ the owner's property.

1 **Comment.** Subdivision (a) of Section 1245.060 is amended to give the property owner the option
2 of seeking compensation otherwise available under this section in a subsequent eminent domain
3 action affecting the same property. See also Section 1250.320(c).

4 Subdivision (c) is amended to codify the judicial reform of that subdivision in *Property Reserve*
5 *Inc. v. Superior Court*, 1 Cal. 5th 151 (2016).

6 The section is also amended to make technical corrections.

7 **Code Civ. Proc. § 1250.320 (amended). Answer**

8 SEC. _____. Section 1250.320 of the Code of Civil Procedure is amended to read:

9 (a) The answer shall include a statement of the nature and extent of the interest
10 the defendant claims in the property described in the complaint.

11 (b) Where the defendant seeks compensation provided in Article 6 (commencing
12 with Section 1263.510) (goodwill) of Chapter 9, the answer shall include a
13 statement that the defendant claims compensation under Section 1263.510, but the
14 answer need not specify the amount of ~~such~~ that compensation.

15 (c) Where the defendant seeks compensation provided in Article 1 (commencing
16 with Section 1245.010) of Chapter 4, the answer shall include a statement that the
17 defendant claims compensation under Section 1245.060, but need not specify the
18 amount of that compensation.

19 (d) Where the defendant seeks compensation for loss caused by the plaintiff's
20 unreasonable conduct prior to commencing the eminent domain proceeding, the
21 answer shall include a statement that the defendant claims compensation for that
22 loss, but need not specify the amount of that compensation.

23 **Comment.** Subdivision (c) of Section 1250.320 is added to provide that any claim for losses
24 caused by pre-condemnation activity compensation must be included in the defendant's answer.
25 See also Section 1245.060(a) (compensation for loss caused by pre-condemnation activity may be
26 sought in eminent domain action, as alternative to other remedies provided in that section).

27 Subdivision (d) is added to provide that any claim for loss caused by the plaintiff's unreasonable
28 conduct prior to commencing the eminent domain proceeding must be included in the defendant's
29 answer. This subdivision does not establish or affect the scope of the defendant's right to
30 compensation for a plaintiff's unreasonable conduct. That right has been established by case law.
31 See *Klopping v. City of Whittier*, 8 Cal. 3d 39 (1972); *Redevelopment Agency v. Contra Costa*
32 *Theatre, Inc.*, 135 Cal. App. 3d 73 (1982); *People ex rel. Dept. Pub. Wks. v. Peninsula Enterprises,*
33 *Inc.*, 91 Cal. App. 3d 332 (1979); *Richmond Redevelopment Agency v. Western Title Guaranty*
34 *Co.*, 48 Cal. App. 3d 343 (1975).

35 Section 1250.320 is also amended to make a technical correction.

36 **Code Civ. Proc. § 1260.230 (amended). Separate assessment of compensation**

37 SEC. _____. Section 1260.230 of the Code of Civil Procedure is amended to read:

38 As far as practicable, the trier of fact shall assess separately each of the following:

39 (a) Compensation for the property taken as required by Article 4 (commencing
40 with Section 1263.310) of Chapter 9.

41 (b) Where the property acquired is part of a larger parcel:

42 (1) The amount of the damage, if any, to the remainder as required by Article 5
43 (commencing with Section 1263.410) of Chapter 9.

1 (2) The amount of the benefit, if any, to the remainder as required by Article 5
2 (commencing with Section 1263.410) of Chapter 9.

3 (c) Compensation for loss of goodwill, if any, as required by Article 6
4 (commencing with Section 1263.510) of Chapter 9.

5 (d) Compensation claimed under subdivision (c) of Section 1250.320.

6 (e) Compensation claimed under subdivision (d) of Section 1250.320.

7 **Comment.** Subdivision (d) of Section 1260.320 is added to require the trier of fact to separately
8 assess compensation for loss caused by the plaintiff's pre-condemnation activity, if that
9 compensation was claimed in the defendant's answer.

10 Subdivision (e) is added to require the trier of fact to separately assess compensation for loss
11 caused by the plaintiff's unreasonable conduct prior to commencing the eminent domain
12 proceeding, if that compensation was claimed in the defendant's answer.